STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2010
v	No. 291145 Jackson Circuit Court
EDWARD LEE WESTBROOK, Defendant-Appellant.	LC No. 08-005040-FH

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of possession of less than 50 grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv). We affirm defendant's conviction, but remand for resentencing.

Defendant first argues there was insufficient evidence presented at trial to prove that he was guilty of the charged crime. We disagree. We review sufficiency of the evidence claims de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing all evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Conflicting evidence is resolved in favor of the prosecution. *Id.*

After considering the evidence adduced in the proper light, we conclude that sufficient evidence was presented to convict defendant under an aiding and abetting theory of possession of less than 50 grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv). The prosecutor established that defendant's girlfriend at the time, Ashily Lasky, committed the underlying offense. Lasky had actual possession of less than 50 grams of cocaine, which she was delivering to the police informant when she was arrested. Officer Smith testified that Lasky came to the apartment where the buyer was located to deliver the cocaine and officers arrested her upon arrival in the apartment. Smith recovered two clear, knotted plastic bags that were confirmed to be crack cocaine from Lasky. Smith also witnessed the buyer order the drugs, and within 15 minutes, Lasky arrived with the cocaine. From this evidence, the prosecutor proved beyond a reasonable doubt that Lasky met each of the elements of possession with intent to deliver. See *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003).

However, there was evidence that defendant took the phone call from the buyer when she ordered the cocaine. Specifically, the buyer testified that when she placed the call for the drugs she recognized the voice on the other end of the phone as defendant. Lasky also testified that she was with defendant when the buyer called and that she drove defendant to a house where defendant obtained the cocaine and returned to the car with it. After obtaining the cocaine, Lasky and defendant went to the buyer's location together to deliver the cocaine.

Moreover, the prosecution provided circumstantial evidence of defendant's involvement in the drug sales by establishing that defendant had $781 in his shirt pocket and that there was another $516 under the driver's seat. This circumstantial evidence of defendant's participation was corroborated by Lasky's testimony that she did not retain the money from the drug sales, but that she would ask defendant for money when she needed to make her car payment.

"'An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.'" *Gonzalez*, 256 Mich App at 226, quoting *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998). We defer to the jury's superior ability to assess the credibility of the witnesses. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Based on the above evidence, a rational trier of fact could have found the evidence sufficient to conclude that defendant aided and abetted Lasky by working with her to obtain and deliver the cocaine. Thus, defendant's challenge of his conviction is without merit.

Next, defendant alleges that the trial court erred in sentencing him to 8 to 20 years in prison by improperly applying sentence enhancements for the drug offense as well as for his status as an habitual offender. The prosecutor concedes that defendant is entitled to sentencing, but does not address the merits of the sentence enhancements. We review defendant's unpreserved sentencing issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Based on defendant's conviction and prior record, defendant was subject to a minimum sentence between 5 and 23 months. The trial court recognized this range and proceeded to enhance the sentence based on defendant's status as a fourth habitual offender and under the double-penalty provision found in the Controlled Substance Act, and presumably due to a mathematical error. Thus, the trial court sentenced defendant to a sentence of 8 to 20 years' imprisonment.

The habitual offender statute, MCL 769.12, provides for sentence enhancement for individuals that have been convicted of three or more felonies. Defendant meets this criterion. However, MCL 769.12 provides an exception where the subsequent felony is a major controlled substance offense. In those situations, the individual "shall be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461." MCL 769.12(1)(c). Defendant's conviction was based on a major controlled substance offense as found in MCL 333.7401. Therefore, because the habitual offender statute defers to the Controlled Substance Act for convictions based on major controlled substance offenses, it was plain error for the court to enhance defendant's sentence based on the habitual offender statute.

The Controlled Substance Act also provides for sentence enhancement. Under that Act, an individual convicted of a second or subsequent offense under the Act "may be imprisoned for

a term not more than twice the term otherwise authorized. . . ." MCL 333.7413(2). The instant conviction was a second or subsequent conviction for defendant under MCL 333.7401(2), which is included in the Act, thus making him subject to the double-penalty provision of MCL 333.7413(2).

Our Supreme Court recently ruled that the penalty provision in MCL 333.7413(2) applies to both the minimum and maximum sentence. *People v Lowe*, 484 Mich 718, 724; 773 NW2d 1 (2009). The Court stated that an interpretation of MCL 333.7413(2) that would "allow both the minimum and maximum sentences to be doubled is most consistent with what is almost certainly the common understanding that a defendant who has been imprisoned for 'twice' his original 'term' will serve twice what he would have otherwise served." *Id.* at 726. Applying the enhancement provision in the Controlled Substance Act and the interpretation found in *Lowe* to defendant's sentence would provide a minimum range of 10 to 46 months, with a statutory maximum up to 40 years.

MCL 333.7413(4) also provides: "The court may depart from the minimum term of imprisonment authorized under subsection (3) if the court finds on the record that there are substantial and compelling reasons to do so." Because the court exceeded the statutorily allowed minimum sentence and failed to articulate substantial and compelling reasons for its departure on the record, this case must be remanded for resentencing.

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens